No. 97-372

(13)

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA,

*Petitioner,*

—v.—

UNITED STATES SHOE CORPORATION,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

## BRIEF FOR *AMICI CURIAE* TEXACO REFINING AND MARKETING, INC., ET AL. SUBMITTED IN SUPPORT OF RESPONDENT

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20 pp

## QUESTION PRESENTED

Whether a tax on exports, levied as an *ad valorem* duty on their export sales price and assessed at point of exportation, violates the Export Clause of the Constitution.

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UNITED STATES SHOE CORPORATION, RESPONDENT

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ON WRIT OF CERTIORARI
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**BRIEF FOR AMICI CURIAE**
**TEXACO REFINING AND MARKETING, INC., et al.**

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## INTEREST OF AMICI

*Amici curiae* Texaco Refining and Marketing, Inc., *et al.* (as listed on annex A hereto), respectfully submit this brief in support of respondent United States Shoe Corporation. Like respondent, *amici* are exporters of goods who have paid substantial *ad valorem* taxes levied as duties directly at point of export and seek recovery of such taxes on the ground that they were unconstitutionally assessed in violation of the prohibitions in the Export Clause of the United States Constitution. Counsel for *amici* have actively participated at all stages of the proceedings below, including oral argument before the Court of International Trade, and they file this brief with the written consent of all the parties.

## SUMMARY OF ARGUMENT

This case presents the simple issue of whether a tax on exports, levied as an *ad valorem* duty on their export sales price and assessed at point of exportation, violates the United States Constitution's express prohibition forbidding Congress from laying taxes or duties on exports. The Court of International Trade in a unanimous three judge opinion and the Federal Circuit in a 4-1 decision both came to the unremarkable conclusion that such a tax is unconstitutional.

That conclusion is neither novel nor controversial. It is consistent with over 80 years of precedent -- precedent this Court re-examined and reaffirmed just one year ago in *United States v. International Business Machines Corporation*, __ U.S. __, 116 S. Ct. 1793 (1996) ("*IBM*"). In *IBM*, this Court held that the Export Clause's prohibition means exactly what it says (116 S.Ct. at 1802), that it specifically prohibits Congress from regulating commerce through export taxes (*id.*) and that changing views of the scope of Congress' powers under the Commerce clause "should not, and indeed cannot" govern its consistent interpretation of the Export Clause's clearcut prohibition (*id.* at 1799).

*IBM*, and the longstanding precedent it discussed and reaffirmed, mandate but one conclusion: the Harbor Maintenance Tax is unconstitutional. The decision below should be affirmed.



## ARGUMENT

### The Harbor Maintenance Tax Violates the Export Clause of the Constitution

The imposition of any tax or duty on exports is expressly prohibited by the Export Clause of the U.S. Constitution. As this Court held in *IBM*, the Constitution says it "simply and directly": "No Tax or Duty shall be laid on Articles exported from any State." 116 S.Ct. at 1796, citing U.S. CONST., ART. I, §9, cl.5.

As this Court further observed in *IBM*, the history of that language's adoption is clear: the Framers knew they were adopting a broad prohibition and explicitly rejected a series of proposals which would have limited its scope. *Id.* at 1803 ("There is substantial evidence from the Debates that proponents of the Clause fully intended the breadth of scope that is evident in the language"); *see also* Madison, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 at 499-503 (Ohio University Press 1984).

A series of court cases, starting with *Fairbank v. United States*, 181 U.S. 283 (1901), have consistently struck down the rare instances where Congress has transgressed the Constitution's simple and explicit limitation on its sovereign power:

> " The requirement of the Constitution is that exports should be free from any governmental burden. The language is 'no tax or duty.'"

181 U.S. at 290 (declaring unconstitutional a tax on bills of lading for exported goods).[1]

The harbor maintenance tax ("HMT") at issue here is clearly denominated as a tax, calculated *ad valorem* on the value of goods as declared in the shipper's export declaration and imposed as a duty at the point those goods are loaded on the export vessel.[2] As such, it is a direct violation of the

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[1] *See also United States v. Hvoslef*, 237 U.S. 1 (1915) (voiding tax on charter parties, holding that the Export Clause was "designed to give immunity from taxation to property that is in the actual course of exportation"); *Thames & Mersey v. United States*, 237 U.S. 19 (1915) (voiding tax on marine insurance policies, stating that proper inquiry is whether tax is "so directly and closely related to the 'process of exporting' that the tax is in substance a tax upon exportation," and holding that insurance was such an essential element to exportation that a tax on insurance amounted to a tax on the goods themselves); *A. G. Spalding Bros. v. Edwards*, 262 U.S. 66 (1923) (voiding sales tax on exports of baseball equipment, even though it also applied to domestic sales, noting that the triggering event for the tax was delivery to the carrier at which point the goods were in the course of export and the constitutional prohibition applied).

[2] 26 U.S.C. §§ 4461(c)(2)(A) (HMT is incurred at time of loading), 4462 (a)(5)(A) (HMT based on the value of goods as determined by the standard commercial export documentation). *See also* 19 C.F.R. § 24.24 (e)(2)(i) ("The fee is based upon the value of the shipment loaded as required to be indicated on the SED [Shipper's Export Declaration] or equivalent documentation"), 15 C.F.R. § 30.7 (SED declared value is export sale price).



Export Clause and a practice specifically declared by *Fairbank* and its progeny to be unconstitutional:

> "If mere discrimination between the States was all that was contemplated, it would seem to follow that an *ad valorem* tax upon all exports would not be obnoxious to this constitutional prohibition. But surely under this prohibition Congress can impose an export tax neither on one article of export, nor on all articles of export."

181 U.S. at 292. *See also A.G. Spalding, supra.*

*Fairbank* further held that the broad limitation imposed by the Export Clause could not be circumvented by nominally imposing a tax upon exports under another constitutional grant of power:

> "We are not here confronted with a question of the extent of the powers of Congress, but one of the limitations imposed by the Constitution on its action . . . . where prohibition or limitation is placed upon the power of Congress that prohibition or limitation should be enforced in its spirit and to its entirety." *Id.* at 288-89.

The government's appeal would have this Court accept that *Fairbank* has been overtaken by Commerce Clause jurisprudence and a gloss of user fee cases flowing from *Massachusetts v. United States*, 435 U.S. 444 (1978). But not one of those user fee cases involved a tax, duty, or

even a fee on exports. Not one of those cases had occasion to consider the express, flat prohibition of the Export Clause. In short, not one of those cases has in any way articulated a holding that would change this Court's consistent interpretation and application of the Export Clause's broad prohibition.[3]

Just the Term before last, this Court in *IBM* resoundingly reaffirmed *Fairbank*, stating that *Fairbank* made it clear that "the Export Clause *strictly* prohibits *any* tax or duty, discriminatory or not, that falls on exports during the course of exportation." 116 S. Ct. at 1797 (emphasis added). This Court explained that the bill of lading tax in *Fairbank*, "though not directly imposed on the goods being exported" was nevertheless "'in effect a duty on the article transported'" (quoting *Fairbank*) and hence "fell directly into the category of forbidden taxes." *Id.*

And this Court concluded by quoting with approval the key holding of *Fairbank*:

> "'The requirement of the Constitution is that exports should be free from any governmental burden. The language is 'no tax or duty.' Whether such provision is or is not wise is a question of policy with which the Courts have

[3] Indeed, the only case cited by the government ever to uphold, over an Export Clause challenge, a fee imposed in connection with the export of goods was *Pace v. Burgess*, 92 U.S. 372 (1875), where the fee was the 25 cent administrative cost of an identifying stamp imposed so that tobacco destined for export would *not* be taxed.



> nothing to do. We know historically that it was one of the compromises which entered into and made possible the adoption of the Constitution. It is a restriction on the power of Congress....'"

*IBM*, 116 S.Ct. at 1797, quoting *Fairbank*, 181 U.S. at 290.

*IBM* was relied upon heavily by both Courts below. Yet tellingly, the government's brief contains not a mention of *IBM*, of its explicit reaffirmation of the broad prohibition of the Export Clause, or of *IBM*'s further declarations that:

- the Export Clause does not permit "the imposition of a generally applicable, nondiscriminatory federal tax on goods in export transit" (116 S Ct. at 1795)

- a non-discriminatory tax placed on goods being delivered to a carrier cannot constitutionally be applied to an export sale (*Id.* at 1798, citing *A.G. Spalding*, *supra*, a case also not cited by the government in its brief here)

- the term "tax" is not sufficiently ambiguous that "we may ignore its common, and usually expansive meaning" (116 S. Ct. at 1802)

- the Export Clause "specifically prohibits Congress from regulating international commerce through export taxes" (*Id.* at 1802)

- "the remedial provision that became the Export Clause does not have a narrow focus" and "there is

substantial evidence from the Debates that proponents of the [Export] Clause fully intended the breadth of scope that is evident in the language." *Id.* 1802, 1803.

Finally, in *IBM* this Court explained that just because readings of the Commerce Clause have become more expansive over the years does not mean that the explicit prohibition on taxes set forth in the Export Clause is now equally fluid and must bow to legislative judgment:

> " Our decades-long struggle over the meaning of the nontextual negative command of the dormant Commerce Clause does not lead to the conclusion that our interpretation of the Export Clause is equally fluid. At one time the Court may have thought that the dormant Commerce Clause required a strict ban on state taxation of interstate commerce, but the text did not require that view. *The test of the Export Clause, on the other hand, expressly prohibits Congress from laying any tax or duty on exports.* These textual disparities strongly suggest that *shifts in the Court's view of the scope of the dormant Commerce Clause should not, and indeed cannot govern our interpretation of the Export Clause.*" *Id.* at 1799 (emphasis added).

This passage was specifically cited and quoted by the appellate court below in this case in rejecting the same "user fee" argument the government makes here again based on *United States v. Sperry Corp.*, 493 U.S. 52 (1989).



Specifically, the Federal Circuit noted that although a "fair approximation of use" might allow a *fee* to survive a claim that it was in violation of the Constitution's Just Compensation Clause (the issue in *Sperry*), the *Sperry* court had to distinguish a case holding registration and axle *taxes* unconstitutional under the Commerce Clause by stating that the Just Compensation Clause analysis was less strict than the analysis which would be applied to the Commerce Clause's prohibition against discrimination in interstate commerce. And, the Federal Circuit went on, "to this we would add that, per *IBM*, the Export Clause is still more restrictive." *United States Shoe Corporation v. United States*, 114 F.3d 1564 at 1573 (Fed. Cir. 1997).

Quite simply, the power to regulate commerce cannot override the Export Clause, as the Supreme Court held in *North American Co. v. SEC*, 327 U.S. 686, 704-05 (1946)[4], another relevant case cited by the court below (*see* 114 F.3d at 1575) but not cited by the government in its brief. And it certainly cannot override the Export Clause where the tax at issue strikes to the very core of that Clause's prohibition: a prohibition against taxes or duties assessed on the goods themselves.

Indeed, what the government fails to acknowledge on this appeal is not only the broad prohibition of the Export

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[4] "For nearly one hundred and twenty-five years, this Court has recognized that the power of Congress over interstate commerce is the power to regulate....This is not to say, of course, that Congress is an absolute sovereign. *It is limited by express provisions in other parts of the Constitution, such as Section 9 of Article I....*" 327 U.S. at 704 (emphasis added).

Clause, but the fact that this Court has consistently recognized that there is a core area of application when the Constitution prohibits export taxes. Thus, in *Thames & Mersey v. United States*, 237 U.S. 19, 35 S.Ct. 496 at 498 (1915), involving the Export Clause, the issue was whether the tax was "so directly and closely related to the 'process of exporting' that the tax is in substance a tax upon the exportation and hence within the constitutional prohibition." In *Dept. of Revenue of Washington v. Washington Stevedoring Companies, et al.*, 435 U.S. 734 (1978), this Court extracted from *Fairbank*, *Thames & Mersey*, and a number of other cases a principle that while *State* taxes upon export-related services such as stevedoring might be sustainable despite the prohibitions of the *Import-Export Clause*, taxes upon goods in the course of export transit assessed directly on their value are not. 435 U.S. at 755-57.

The *IBM* case continued to recognize this core principle developed in Import-Export Clause jurisprudence. *See, e.g.*, 116 S.Ct. at 1800. And the Court in *IBM* flatly and unequivocally held that this core principle is equally applicable when the Export Clause is involved, absolutely prohibiting an assessment levied *ad valorem* on the goods themselves:

> "We conclude that the Export Clause does not permit assessment of nondiscriminatory federal taxes on goods in export transit."

116 S. Ct. at 1804.

Indeed, *IBM* further noted that because the constitutional prohibition set forth in the Export Clause is



*stricter* than the Import-Export prohibition (116 S.Ct. at 1801-02) judicial application of the Export Clause's prohibition has been *even greater* in scope:

> "This Court has never held that the Export Clause prohibits only direct taxation of goods in transit....In *Fairbank*, *Hvoslef* and *Thames & Mersey*, we struck down taxes that were not assessed directly on goods in export transit but which the Court found to be effectively a tax on the goods themselves. We have never repudiated that principle, but neither have we ever carefully defined how we decide whether a particular federal tax is *sufficiently related to the goods or their value to violate the Export Clause*." 116 S.Ct. at 1800-01 n.4 (emphasis added).

However, the government in *IBM* elected not to address the issue of whether a tax on an export insurance policy (presumably correlating in some manner to value of the insured goods being exported) was close enough to be an effective tax on the goods in export themselves. *Id.* at 1800. Accordingly, the Court in *IBM* decided that "the question whether a particular assessment on an activity or service is so closely connected to the goods as to amount to a tax on the goods themselves must await another day." *Id.* at 1804.

This case does not present that "other day." Nor does it present the issue of how far the Export Clause's prohibition extends beyond the core principle prohibiting direct taxation of the goods in transit themselves, or the question of when a tax is "so connected to the goods as to

amount to a tax on the goods themselves." Rather, the Harbor Maintenance Tax *is* a tax on the goods themselves.

Specifically, the Harbor Maintenance Tax is a direct tax on goods in export transit, assessed on their export sales value and due at the point they go over the rail onto an oceangoing vessel. *As such, the Harbor Maintenance Tax is a tax that strikes to the quick -- to very heart and core of the Constitution's Export Clause prohibition as consistently recognized in the case law and reaffirmed in IBM.*

Amici do not believe there is -- or should be -- any "user fee" exception to this clear and simple prohibition. And if so plain and obvious a tax on exports as the Harbor Maintenance Tax could nevertheless survive muster by being called a "fee," then contrary to this Court's repeated holdings that the Export Clause is a broad prohibition on sovereign power, that prohibition would not only no longer be broad, it would be no prohibition at all. The careful distinctions and analysis of *IBM* and the issues which divided the Court over how close a tax must be before it is a prohibited tax on the goods themselves would be meaningless, for a tax on the goods themselves would no longer be prohibited. The reaffirmation of the Export Clause's textual command against any tax would ring hollow and be without substance.

As this Court held in *IBM*, "shifts in the Court's view of the scope of the dormant Commerce Clause should not, *and indeed cannot* govern our interpretation of the Export Clause." 116 S. Ct. at 1799 (emphasis added). As such, whatever the subsequent development of the constitutional interplay between the Commerce Clause and *other*



constitutional limitations, the Harbor Maintenance Tax is repugnant to the express textual prohibitions of Export Clause and cannot stand regardless of whether it might be permitted by some other provision of the Constitution.

In any event, the Harbor Maintenance *Tax* is just that, and not a "user fee," as both courts below demonstrated in their analysis of *Massachusetts v. United States*, 435 U.S. 444 (1978) and its progeny. *See United States Shoe Corporation v. United States*, 907 F. Supp. 408, 413-15 (C.I.T. 1995), *aff'd* 114 F.3d 1564, 1572-74 (Fed. Cir. 1995). The HMT makes no effort to correlate the amount of the tax to the amount of harbor use or to approximate the costs of such use.[5] It is wholly dependent upon revenues realized through export sales transactions with overseas purchasers whose purchase prices are unrelated to such use.[6] And the tax consistently results in a substantial surplus that exceeds harbor maintenance costs and is applied

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[5] Thus, for example, a shipper of a trunkload of diamonds would pay more than one exporting a tanker-full of coal and an exporter shipping on one tanker filled with $10 million worth of goods would pay as much as an exporter who shipped on 10 tankers each containing $1 million worth of goods.

[6] The export sales price is a function of export market conditions for the products being sold and the competitiveness of U.S. products in such markets.

to reduce the budgeted federal deficit.[7] Such a levy is not a "user fee" for services -- it is a tax on exports.[8]

However, while there is no conflict between the Export Clause and the Commerce Clause on the specific facts of this case, and while the opinions below in large part rested on distinguishing cases which have involved different, and more flexible constitutional limitations, in the final analysis one central point must govern: the Export Clause

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[7] *See* the findings of fact in the opinion of the three-judge panel below, *United States Shoe Corporation v. United States*, 907 F. Supp. 408, 412 (C.I.T. 1995), *citing*, *inter alia*, H.R. Rep. No. 251 pt. III, 99th Cong, 1st Sess. 19, reprinted in 1986 U.S.C.C.A.N. 6639.

[8] *Contrast New Orleans Steamship Ass'n v. Plaquemines Port, Harbor & Terminal Dist.*, 874 F.2d 1018 (5th Cir. 1989), *cert. denied*, 495 U.S. 932 (1990) (charges based on tonnage); *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines*, 405 U.S. 707 (1972) and *Massachusetts v. United States*, 435 U.S. 444 (1978) (charges on a per use basis); *United States v. Sperry Corp.*, 493 U.S. 52 (1989) (no showing that arbitral fees keyed to claim dollars at issue did not approximate arbitral costs of resolving complex disputes; fees did not offend Just Compensation Clause); *Alamo Rent-a-Car, Inc. v. City of Palm Springs*, 955 F.2d 30, 31 (9th Cir. 1992) (airport concession fees which are a percentage of rental car company's income generated at that location and hence a direct function of use of that location do not discriminate against interstate commerce; no proof fees exceeded services airport provided); *cf. Moon v. Freeman*, 379 F.2d 382, 392 (9th Cir. 1967)(even an export certificate fee correlating to a per use basis would be a suspect exercise of the commerce power if substantial amounts of revenue were generated).



is an explicit limitation on sovereign power which must be recognized and given its full force and effect. The tax at issue here presents the easy case of a tax which falls within the central focus of that limitation and which accordingly cannot stand regardless of whatever justification the government may attempt to raise in its defense.

Amici respectfully submit this brief because we believe this simple principle lies at the heart of this case and requires affirmance of the decision below.

## CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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January 13, 1998

# ANNEX A

# ANNEX A

## LIST OF AMICUS PARTIES

A.T. Massey Coal Company, Inc., A&D Christopher Ranch, ABRO Industries, Inc., Adam Opel AG, Ahlstrom Pumps LLC, Air Liquide Process & Construction, Inc. and Bowen Tools, Inc., Alaskh Trading Corporation and Beef America Operating Company, Inc., Alfred C. Toepfer International, Inc., AlliedSignal Chemicals Inc., AlliedSignal Inc., AlliedSignal Laminate Systems, Inc., Alpha International, American Greetings Corporation, American Natural Soda Ash Corporation, American Standard Inc., Amtopp Corporation, Ansell Edmont Industrial, Inc., Aristech Chemical Corporation, Aristech Chemical International, Ltd., AVX Corporation, Barcroft Company/Rorer International Corporation, Betz International, Inc./Betz Europe, Inc., Borden Chemical, Inc., Borden Incorporated and ACME/Borden, Bowater Incorporated, Bridgestone/Firestone, Inc., Bristol-Myers Squibb Company, Bristol-Myers Barceloneta, Inc., Brown & Williamson Tobacco Corporation, By-Prod Corporation, Canada Trade Group Inc., Central Soya Company, Inc, Champion Export Corporation, Champion International Corporation, Chemlube International Inc., Chesebrough-Ponds USA Company, Cluett, Peabody & Company, Inc., Coastal Coal Sales, Inc., Coastal Eagle Point Oil Company, Coastal Mobile Refining Company, Coastal Refining & Marketing, Inc., Coastal States Energy Company, Coastal States Trading, Inc., Coffin Turbo Pump, Inc., Condea Vista Company f/k/a Vista Chemical Company, Conopco, Inc. d/b/a Calvin Klein Cosmetics Company, CPS Chemical Company, Inc., Day-Glo Color Corporation, Degussa Corporation, Demag Delaval Turbomachinery Corporation and Kinetics Technology International Corporation, Dorland Management, Inc., Duracell Inc., E.R. Squibb & Sons, Inc., Eastern Smelting & Refining Corporation, Elf Atochem North America, Inc., Eli Lilly & Company, Elizabeth Arden Company, Erexcorp Inc., FAI Trading Company, Federal Paper Board Company, Formosa America, Formosa Plastics Corporation, USA, Freudenberg Nonwovens

L.P., G.F. Vaughan Tobacco Company, Inc., Gates Rubber Company, General Motors Corporation, George E. Warren Corporation, Glen Raven Mills, Inc., Global Trading Resource Corporation, GOJO Industries, Inc., GSI Exim America, Inc., H.B. Fuller Company, Heinz Pet Products Company, Heinz U.S.A., Hendrickson Trailer Suspension Systems, a division of the Boler Company, Henkel Corporation, Hershey Foods Corporation, HKV, Holden's Motor Overseas Corporation Limited, Hughes Aircraft Company, Hughes Aircraft System International, Hughes Communication Galaxy, Inc., Hughes Electronics Corporation, Hughes Network Systems, Inc., Hughes Space and Communications International, Inc., Huls America, Inc., The Iams Company, Integrated Bagging, Inteplast Corporation, ISP Technologies, Inc., J.C. Penney Company, Inc., J.C. Penney Purchasing Corporation, Johnson Matthey Inc., K2 Corporation, Kenetech Windpower, Inc., Ketchikan Pulp Company, Louisiana Carbon Company, Louisiana Pacific Corporation, Lyondell-Citgo Refining Company, Ltd., Lyondell Petrochemical Company, Magma Copper Company, Magnavision, Inc., Magnavox Electronic Sys. Company, Mapco Alaska Petroleum Inc., Mapco Coal Inc., Matrix Essentials, Inc., M-C International, Miller Brewing Company, Morflex, Inc., Nan Ya Plastics Corporation, America, Nap-Key Stainless, Naporano Iron & Metal Company, National Dynamics Corporation, North American Chemical Company, North Safety Products, Ore-Ida Foods, Inc., Oxbow Carbon International, Inc., Oxbow Carbon & Minerals, Inc., Park Avenue Export Corporation, PCS Phosphate Company, Inc., Pfizer Corporation, Pfizer, Incorporated/Pfizer Pigments, Inc., Pfizer Overseas, Inc., Pharmacia and Upjohn Worldwide, Phillip Morris Products, Inc., Plough International, a division of Schering-Plough Healthcare products Inc. and Schering-Plough Products Inc., PMC Specialties Group, Inc., Producers Rice Mill, Inc., Quaker State Corporation, Reading & Bates Drilling Company, Reilly Industries, Inc., Rheinbraun Thyssen Energy, Inc., Samsung America, Inc., Saturn Corporation, Schlumberger Industries, Inc., Schlumberger Technology Corporation, Schweitzer-Mauduit International, Inc., Seibe North, Inc.,



Simsmetal America, Specialty Minerals Inc. and Barretts Minerals Inc., Specialty Oil Company, Inc., Squibb Manufacturing, Inc., Star Enterprise, Star-Kist Caribe, Inc., Star-Kist Seafood Company, Sumitomo Electric Lightwave Corporation, Sumitomo Electric USA, Inc., Sumitomo Electric Wiring Systems, Texaco, Inc., Texaco International, Trader, Inc., Texaco Refining & Marketing, Inc., TG (Texas Gulf) Soda Ash, Inc., TG (USA) Corporation, Thyssen Citgo Petcoke Corporation, Trane Export, Inc., Trane Company, Trane Co./Trane Export, Inc., Union Process, Inc., United Export Corporation/ABRO Industries, Inc., Universal Manufacturing Corporation, UOP, Vitol S.A., Inc., Vulcan Materials Company and Vulcan Gulf Coast Materials, Inc., Welch Foods Inc., a Cooperative, Westfalia Separator, Inc., Weyerhaeuser Company, Weyerhaeuser International Sales Corporation and Norpac Sales Corporation, World Pak, York International Corporation and Bristol Compressors Inc.